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No.

In The

Supreme Court of the United States

October Term, 1996

JAY FOWLER and BARBARA FOWLER, parents and next friend of MICHAEL FOWLER,

Cross-Petitioners,

vs.

UNIFIED SCHOOL DISTRICT NO. 259, SEDGWICK COUNTY, KANSAS,

Cross-Respondent.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, establishes minimum federal standards, but also incorporates more generous standards imposed by state law; the Court of Appeals misinterpreted as mere restatements of IDEA minimum requirements the commands of the Kansas Auxiliary Services Act, Kan. Stat. Ann. § 72-5392 *et seq.*, and its implementing regulations, that whenever a school district provides "auxiliary school services" to public school students it must also "provide on an equal basis the same auxiliary school services to every pupil, whose parent . . . makes a request therefor, residing in the school district and attending a private, nonprofit school."

2. 34 C.F.R. § 76.655 establishes a default rule that the average amount a Local Educational Agency spends in providing IDEA benefits should be the same for students enrolled in private schools as for students enrolled in public schools; the Court of Appeals properly relied on that regulation, but improperly read out of existence the very same regulation's additional mandate that expenditures on IDEA benefits should differ as between private school students and public school students when the average cost of meeting student needs differs as between the two groups.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 107 F.3d 797 and is reprinted in the appendices to petitioner's petition for writ of certiorari [hereinafter "Pet. App."] at A-1 to A-31. The opinion of the United States District Court for the District of Kansas is reported at 900 F. Supp. 1545 and is reprinted at Pet. App. B-1 to B-17. The opinion of the Kansas State Review Officer and the local due process hearing officer are unreported and are reprinted at Pet. App. C-1 to C-12 and D-1 to D-13, respectively.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 21, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, currently provides in relevant part as follows:

> *20 U.S.C. § 1412:*
>
> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:
>
> (1) The State has in effect a policy that

assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title . . . which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake in order to assure that —

> (B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, ...

20 U.S.C. § 1413(a)(4):

(a) any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall —

* * *

(4) set forth policies and procedures to assure —

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that —

(I) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; . . . .

2. The Assistance to States for the Education of Children with Disabilities (IDEA) Regulations, (34 C.F.R. § 300), currently provide in relevant part as follows:

34 C.F.R. § 300.401:

Each S[tate] E[ducational] A[gency] shall ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency:

> (a) Is provided special education and related services —
>
> > (1) In conformance with an IEP that meets the requirements of §§ 300.340-300.350;
> >
> > (2) At no cost to the parents; and
> >
> > . . .
>
> (b) Has all of the rights of a child with a disability who is served by a public agency.

34 C.F.R. § 300.403(a):

(a) If a child with a disability has [a] F[ree] A[ppropriate] E[ducation] available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.452 [pertaining to Children With Disabilities Enrolled by their Parents in Private Schools].

34 C.F.R. § 300.451:

The SEA shall ensure that:

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements of 34 CFR §§ 76.651-76.662 are met.

34 C.F.R. § 300.452:

Each L[ocal] E[ducational] A[gency] shall provide special education and related services to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.

3. The Education Department General Administrative Regulations ("EDGAR"), (34 C.F.R. Part 76), currently provide in relevant part that with respect to the "Participation of Students Enrolled in Private Schools" in state-administered programs:

34 C.F.R. § 76.651(a)(1) and (2):

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing

statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs. . . .

34 C.F.R. § 76.652(c)(1)-(4):

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided;

. . . .

34 C.F.R. § 76.654(a):

(a) The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

34 C.F.R. § 76.655:

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

34 C.F.R. § 76.656(a)-(c):

An applicant for a subgrant shall include

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to receive benefits under the program.

> (c) The number of students enrolled in private schools who will receive benefits under the program.

4. Congress has recently approved legislation that amends several sections of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, including the provision relating to the provision of special education and related services for parentally-placed private school students. The President has announced that he will sign the legislation into law. The amended statute, which will become effective upon enactment, provides in relevant part:

> Children in private schools. —
>
> (A) Children enrolled in private schools by their parents. —
>
> (I) In general. — To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f).
>
> (I) Amounts expended for the provision of those services by a

> local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.
>
> (II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

5. The Kansas Special Education for Exceptional Children Act ("KSEECA"), Kan. Stat. Ann. § 72-961 *et seq.*, was enacted in 1974 to implement the state requirements of the federal Education for All Handicapped Children Act, subsequently renamed the Individuals with Disabilities Education Act. KSEECA does not address the provision of special education and related services to parentally-placed private school children. That matter is addressed in the Kansas Auxiliary Services Act, Kan. Stat. Ann. § 72-5392 *et seq.*, enacted in 1980, which provides:

> **72-5392. Private school pupils; auxiliary school services; definitions.** As used in this act:
>
> (a) "School district" means any public school district organized under the laws of this state.
>
> (b) "Auxiliary school services" means (1) speech and hearing diagnostic services; (2) diagnostic psychological services; (3) therapeutic psychological and speech and

hearing services; and (4) programs and services for exceptional children.

(c) "Private, nonprofit elementary or secondary school" means an organization which regularly offers education at the elementary or secondary level, which is exempt from federal income taxation under section 501 of the federal internal revenue code of 1954, as amended, which conforms to the civil rights act of 1964, and attendance at which satisfies any compulsory school attendance laws of this state.

72-5393. Same; conditions for provision; location; transportation. Any school district which provides auxiliary school services to pupils attending its schools shall provide on an equal basis the same auxiliary school services to every pupil, whose parent or guardian makes a request therefor, residing in the school district and attending a private, nonprofit elementary or secondary school whether such school is located within or outside the school district. No school district shall be required to provide such services outside the school district. Any such school district may provide auxiliary services to all pupils attending a private, nonprofit elementary or secondary school located within the school district whether or not all such pupils reside in the school district. Speech and hearing diagnostic services and diagnostic psychological services, if provided in the public schools of the school

> district, shall be provided in any private, nonprofit elementary or secondary school which is located in the school district. Therapeutic psychological and speech and hearing services and programs and services for exceptional children, which cannot be practically provided in any private, nonprofit elementary or secondary school which is located in the school district, shall be provided in the public schools of the school district, in a public center, or in mobile units located off the private, nonprofit elementary or secondary school premises as determined by the school district; and, if so provided in the public schools of the school district or in a public center, transportation to and from such public school or public center shall be provided by the school district.

6. Part XII of the Kansas State Plan For Special Education provides in relevant part:

> 1. *Local Education Agency (LEA) Responsibility.* K.S.A. 72-5393 and K.A.R. 91-12-39 sets [sic] forth the responsibilities of school districts for children and youth with an exceptionality enrolled in private schools. The special education services required by State statute and regulation must be provided to *all* children and youth of school age. Therefore, school districts must make available to private school students the following services:
>
> > a. screening and identification services;

b. appropriate special education services, as specified in an individualized education program;

c. transportation to special education services when necessary; and

d. procedural due process.

2. *Requirements for Provision of Services by LEA.* The services provided to private school students must be comparable in quality, scope, and opportunity for participation in the services provided for public school students. However, if the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, the local education agency must provide different services appropriate to individual needs. Special education services may be provided to private school students through such arrangements as dual enrollment or mobile equipment. Public school personnel may also be assigned to serve in private schools that are not denominational or parochial. Only screening and diagnostic services to identify children and youth with an exceptionality may be provided by public school personnel on the premises of any denominational or parochial school.

STATEMENT OF THE CASE

Meningitis rendered Michael Fowler profoundly deaf when

he was just an infant. From preschool through the third grade, Michael attended Caldwell Elementary School, the school at which Petitioner Unified School District No. 259, Sedgwick County, Kansas ("the District") concentrates special education services for hearing-impaired elementary-age schoolchildren. While some of these children take their academic subjects in "resource rooms" with other children of like infirmity and a specially trained teacher, other hearing-impaired students attend some or all core subjects in regular education classes at Caldwell. From kindergarten, Michael attended regular education classes with only minimal resource room support designed to assist his acquisition of intelligible speech. Aplt. App. at 1023-26.[1] Michael is able to function in regular education classes only if he has access to a sign language interpreter. Michael has required additional related services throughout his school career: (1) speech/language therapy; (2) audiological services; and (3) assistive devices. All these services were provided to Michael through the third grade at Caldwell Elementary at public expense pursuant to Michael's individualized education plan ("IEP") as required by 20 U.S.C. § 1412 and the State Plan. Aplt. App. at 1047-48.

In November 1993, the District tested Michael's intellectual capacity; it found that Michael functioned at the very superior level and had an IQ of about 140. Aplt. App. at 1029;1431-44. The District, however, provided no enrichment or special programming to meet Michael's need for intellectual challenge, Aplt. App. at 1029, and Michael complained that he was bored by his schoolwork at Caldwell. Aplt. App. at 807. In May 1994 at an annual IEP conference, the District refused to honor respondents' request to identify Michael as gifted or provide any special programming to address his intellectual capacity.

1. "Aplt. App." references are to the Appellant's Appendix filed in the Court of Appeals. "Pet. App." references are to the appendices to the District's petition for a writ of certiorari.

Aplt. App. at 1030-32. Pursuant to 20 U.S.C. § 1415(b)(1) and Kan. Stat. Ann. § 72-972, Michael's parents challenged the appropriateness of Michael's IEP by requesting a Level I due process hearing. Aplt. App. at 96; 1032. Concurrently, Michael's parents obtained an independent educational evaluation of Michael's intellectual and academic potential at the research facility maintained by Boys' Town in Omaha, Nebraska. This evaluation corroborated the results of the District's November 1993 testing. Aplt. App. at 1033.

Dissatisfied with the District's refusal to program for Michael's intellectual needs, Michael's parents applied for the 1994-95 academic year to Wichita Collegiate School, a private nonsectarian elementary and secondary school located within the boundaries of the District. Michael was admitted to Collegiate after successfully completing the required entrance exams. Aplt. App. at 1034. Michael's parents requested that the District provide an on-site sign language interpreter for Michael at Collegiate at public expense pursuant to IDEA and the Kansas Auxiliary Services Act. The District denied their request. Aplt. App. at 1035.

In early August 1994, just before the scheduled due process hearing, the District belatedly agreed that Michael should be identified as gifted. The District revised Michael's IEP to provide that he would receive indirect services by having his regular classroom teacher work with a gifted teaching consultant to enrich his curriculum. Aplt. App. at 1531-44. As a result of the District's action and its agreement to continue to provide Michael with the related services of speech/language therapy, audiological services, and assistive devices, the only issue left for the due process hearing was the District's refusal to provide an interpreter for Michael at Collegiate. Aplt. App. at 271-99.

The due process hearing was conducted on August 4, 1994.

Aplt. App. at 409-551. On August 25, the hearing officer issued his decision, and concluded that the District was obligated to provide interpretive services for Michael at Collegiate. The hearing officer determined that the Kansas Auxiliary Services Act explicitly requires a school district to provide interpretive services at a private school if it can be done practically, and rejected the District's attempt to demonstrate that it could not practically provide services for Michael at Collegiate. Pet. App. at D-9 to D-14.

The District appealed the hearing officer's decision to the State Board of Education on September 12, 1994. Aplt. App. at 315-16. On November 4, 1994, the state-level review officer reversed the hearing officer's ruling, and concluded that because the District provided interpretive services to hearing-impaired students at Caldwell on a "cluster" basis and Michael might be in a class with another deaf child requiring an interpreter, the Kansas Auxiliary Services Act did not compel the District to provide one-on-one interpretive services for Michael at Collegiate. The review officer reasoned that the state statute required the District to provide services in private schools on an "equal basis" with those services provided in the public schools, and the District was therefore not obligated to provide Michael with greater services, *i.e.* one-on-one interpretive services, than he would receive at Caldwell. Pet. App. at C-8 to C-10.

In November, 1994, respondents appealed this adverse determination to the United States District Court for the District of Kansas. The parties conducted discovery, and a trial was set for August 28 and 29, 1995.

While the parties prepared for trial, Michael attended Collegiate during the 1994-95 school year. The District provided Michael with assistive devices, audiological services, and

speech/language therapy, as well as indirect gifted services. "Assistive devices" refers to an FM amplification system that allows a teacher wearing a microphone to communicate directly to Michael without the interference of background noise that would otherwise be filtered through his hearing aids. The District provided that service to Michael on the premises of the private school. Aplt. App. at 880-82.

The audiologist who serves Michael measures, quantifies, and defines the degree of Michael's hearing loss. She also fits and monitors the function of his hearing aids and the FM-transmitting assistive devices. While essential, these services can be accomplished in one or two sessions each academic year. Further, the audiologist uses bulky, sophisticated equipment that cannot reasonably be moved from site to site. Michael has gone to the audiologist at Caldwell to avail himself of her services while he has been enrolled at Collegiate. Aplt. App. at 881-82; 1036. Respondents have never contended the audiologist's services should be provided to Michael on-site at Collegiate. During the 1994-95 school year, Michael received speech/language services twice a week for one hour at Caldwell. These services were provided to Michael by a speech therapist and a hearing-impaired instructor in a resource room setting. The District reimbursed respondents for the cost of transporting Michael to Caldwell to receive these services. Aplt. App. at 882; 1036. Respondents have never contended the speech/language services should be provided to Michael on-site at Collegiate. Finally, the District provided Michael with indirect gifted services during the 1994-95 school year. Richard Dame, Michael's gifted consultant, met monthly with Michael's teacher on the premises of Collegiate to track Michael's progress. Aplt. App. at 929-930.

On May 30, 1995, an IEP meeting was conducted by the District to determine appropriate services to meet Michael's

special educational needs during the 1995-96 school year. It was determined that Michael should continue to have full-time interpreting services, assistive devices, speech/language services, and audiologist services. Of particular importance, it was decided that Michael should have 180 minutes of gifted services per day in a gifted resource room. Aplt. App. at 1545-52.

During the 1994-95 school year, there was no gifted resource classroom at Caldwell, and no other elementary deaf children had been identified as gifted. Gifted resource rooms were available at other elementary schools within the District. Aplt. App. at 927. At the IEP meeting, District representatives indicated that if Michael attended Collegiate during the 1995-96 school year, he could be transported daily from that school to Minneha Elementary School, three blocks away, to receive three hours of gifted services in a resource room setting. Aplt. App. at 932-33; 1039. Respondents renewed their request to the District to provide Michael with interpretive services on-site at Collegiate at public expense during the 1995-96 school year. The District denied this request, but agreed to continue to provide Michael with assistive devices at Collegiate and speech/language therapy and audiological services at Caldwell. Aplt. App. at 891-92.

During the two-day trial conducted by the district court in August 1995, the District proposed that should Michael return to Caldwell, it would establish a new gifted resource room at Caldwell and transfer to it a few hearing-able students then receiving such services at other schools. Initially, a floating itinerant staff member would have been assigned as the instructor in the Caldwell gifted resource room. Because Michael would have been the only hearing-impaired student in the gifted program at Caldwell, he would have received one-on-one interpretive services for a minimum of the half of each day he spent in the resource room. Aplt. App. at 1075-81.

Evidence presented during the trial demonstrated that the District has not infrequently provided a hearing impaired student participating in a special program with a one-on-one interpreter. Although the District "clusters" services for hearing impaired students at Caldwell, Curtis Middle School, and Southeast High School, in 1994-95 the District assigned a full-time interpreter to assist a hearing-impaired student participating in a special education program at the Starkey Developmental Center. Aplt. App. at 1181. Another interpreter accompanied a single hearing-impaired high school student to the District's vocational-technical school. Aplt. App. at 989-90; 1113-16. Prior years saw similar assignments outside the cluster, sometimes because of parental preferences. Aplt. App. at 449.

At trial, respondents presented evidence rebutting the District's claims concerning the shortage of qualified interpreters. In recent years, the District has experienced difficulty in hiring qualified interpreters for hearing-impaired students, a situation caused in part by the fact that the District uses SEE II as the method of communication rather than the more prevalent ASL (American Sign Language). At trial, respondents' expert witness, Dr. Bernhardt Jones, testified that while the demand for qualified interpreters continues to outpace the supply, the situation is improving. Dr. Jones' interpreter training program at Johnson County Community College has seen an increase in the number of graduates in the last few years. An additional interpreter training program has been established by Cowley County Community College at a satellite site just outside of Wichita. Aplt. App. at 943-44. Although students in these two programs are trained in ASL, they can be trained quickly to interpret in the classroom using SEE II. Dr. Jones' research reveals that ASL-trained interpreters who have completed a brief intensive summer study program in SEE II have performed well as classroom interpreters using SEE II. Aplt. App. at 942-42; 1236-38.

Moreover, a significant factor in the shortage of qualified interpreters is the District's failure to pay adequate wages. The District pays significantly less than the national average for educational interpreters. Aplt. App. at 775-84. Evidence in the record demonstrates that were the pay of interpreters higher, at least one qualified, experienced educational interpreter would return to the District's employ. Aplt. App. at 785-86. Thus, the District's shortage of qualified interpreters is, to some degree, self-inflicted and could be remedied by paying more competitive salaries.

On October 16, 1995, the district court entered its decision requiring the District to provide an interpreter for Michael at Collegiate. Interpreting the applicable state and federal statutes and regulations, the district court concluded that the District "cannot deny interpretive services to Michael at Collegiate unless it can prove there is no reasonable way to provide those services." Pet. App. B at B-14. The district court determined that the District could not make such a showing in light of the fact that it routinely provided one-on-one interpretive services for students enrolled in special programs away from the cluster site. Pet. App. B at B-14 to B-15.

The district court entered an order requiring the District to provide interpretive services for Michael at Collegiate and awarding reimbursement for the cost to respondents of providing such services for Michael during the 1994-95 school year and a portion of the 1995-96 school year. Pet. App. B at B-16. In a subsequent order, the district court awarded attorney fees to respondents.

In its petition to this Court, the District contends that the district court concluded that "the costs of serving the Fowlers at Collegiate *would* exceed the costs of services in the public schools. . . ." Petition for Writ of Certiorari at 10 (emphasis

added). In fact, the district court concluded that "[t]he cost of providing interpretive services for Michael at Collegiate *may* be higher than the cost of those services at Caldwell." Pet. App. at B-6 (emphasis added). The district court further noted that "some increase in cost is not necessarily financially burdensome to the district." *Id.*

The District and the respondents differ as to their assessments of the costs of providing Michael with an interpreter at Collegiate. Indeed, the evidence at trial conflicted as to the costs of interpreters in the public schools. Since the district court made no findings as to costs in either site, the Tenth Circuit ordered the case to be remanded so this last detail could be more deeply explored. Hence this case arrives at this Court's doorstep without a fully developed record on this significant point.

Costs of interpreters are not the whole story as to dollars and cents, however. Had Michael returned to a District school for his education, the District would have been obligated to assume the costs of providing gifted services for him. As described *supra*, the District proposed to establish a new gifted classroom at Caldwell Elementary so as to be able to serve Michael at its cluster site for deaf and hearing-impaired students should he disenroll from Collegiate. The District was unable to even estimate the costs of such a development, but they would have been substantial.

Regardless of the costs of interpretive services in various sites, the evidence presented at trial demonstrated that the District had budget authority to hire an additional educational interpreter at the elementary level at all times relevant to this dispute. Aplt. App. at 874. For several of the most recent years, additionally, the District's special education budget has had a significant cash balance at fiscal year end, indicating that the District did not spend all the money budgeted for special

education during the preceding school year. Aplt. App. at 842-43; 1467-72. Thus, the District would not have been required to cut back other special education services or programs to provide an interpreter for Michael at Collegiate.

The District appealed the district court's rulings to the United States Court of Appeals for the Tenth Circuit. The court issued its decision on February 21, 1997, reversing in part and affirming in part the district court's ruling. Based on its interpretation of the relevant provision of the IDEA, 20 U.S.C. § 1413(a)(4), and its interpretive regulations, the court concluded:

> [W]e are faced here with the question of whether an individual disabled child, who requires an individualized service which only benefits him if it is provided to him on-site, throughout his educational day, is entitled to that individualized service at the private school he has chosen to attend. We conclude that, in such a situation, the District must pay for that service an amount up to, but not more than, the average cost to the District to provide that same service to hearing-impaired students in the public school setting.

Pet. App. at A-24. The court reached the same result in interpreting the Kansas Auxiliary Services Act:

> The District contends that requiring it to provide an interpreter to Michael at Collegiate, even if it would cost the District more to do so than to provide an interpreter to Michael at Caldwell, would violate the

> "equal basis" provision, because it would require the expenditure of more funds for Michael than for a similarly situated public school student. . . . We agree with the District that, as with the IDEA and its regulations, cost must play a role in determining whether a service is provided on an "equal basis" under Kan. Stat. Ann. § 72-5393. We therefore conclude that, under the Kansas statute, construed in light of our interpretation of the federal regulations, Michael is entitled to no more than he is under the IDEA and its regulations: the provision of an interpreter on-site at Collegiate at a cost no greater than the average cost of providing hearing-impaired students with interpretive services at public schools.

Pet. App. at A-29 to A-30. Finally, the Court of Appeals determined that respondents were entitled to an award of attorney fees, noting that "[t]he Fowlers have clearly prevailed; they will receive at least partial, perhaps total, reimbursement for a sign language interpreter the District initially completely refused to pay for or provide." Pet. App. at A-30.

REASONS FOR GRANTING THE CROSS-PETITION

I.

THE COURT OF APPEALS MISINTERPRETED AS MERE RESTATEMENTS OF IDEA'S MINIMUM REQUIREMENTS THE COMMANDS OF THE KANSAS AUXILIARY SERVICES ACT THAT A SCHOOL DISTRICT PROVIDING INTERPRETIVE SERVICES TO PUBLIC SCHOOL STUDENTS MUST ALSO "PROVIDE ON AN EQUAL BASIS THE SAME AUXILIARY SCHOOL SERVICES TO EVERY PUPIL, WHOSE PARENT ... MAKES A REQUEST THEREFOR, RESIDING IN THE SCHOOL DISTRICT AND ATTENDING A PRIVATE, NONPROFIT SCHOOL."

The IDEA establishes a minimum standard for special education programs, but States may develop programs and standards that exceed the federal requirements. When a State has such enhanced special education offerings, the IDEA is considered to have incorporated the state standards. Kansas is thus free to impose on its school districts obligations greater than those of the IDEA. *See Johnson v. Independent School Dist. No. 4*, 921 F.2d 1022, 1029 (10th Cir. 1990).

The Kansas Auxiliary Services Act, Kan. Stat. Ann. § 72-5392 *et seq.*, provides in pertinent part as follows:

> Any school district which provides auxiliary school services to pupils attending its schools shall provide on an equal basis the same auxiliary school services to every pupil, whose parent or guardian makes a request therefor, residing in the school district and attending a private nonprofit elementary or

> secondary school which is located in the school district. Therapeutic psychological and speech and hearing services and programs and services for exceptional children, which cannon be practically provided in any private, nonprofit elementary or secondary school which is located in the school district, shall be provided in the public schools of the school district, in a public center, or in mobile units located off the private, nonprofit elementary or secondary school premises as determined by the school district.

Pet. App. at E-1 to E-2. The Kansas State Plan for Special Education, the development of which is a condition precedent to the approval of a state's programs for receipt of federal funds, explicitly describes the enhanced requirements Kansas imposes on local educational agencies to serve parentally-placed private school students. It states as follows:

> K.S.A. 72-5393 . . . sets forth the responsibilities of school districts for children and youth with an exceptionality enrolled in private schools. The special education services required by State statute and regulation must be provided to *all* children and youth of school age. Therefore, school districts must make available to private school students the following services:
>
> * * *
>
> b. appropriate special education services, as

> specified in an individualized education program. . . .
>
> * * *
>
> The services provided to private school students must be comparable in quality, scope, and opportunity for participation to the services provided for public school students. However, if the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, the local education agency must provide different services appropriate to individual needs. . . .

Pet. App. at E-3 to E-4 (emphasis in original).

The state law, whose unambiguous language must be interpreted to carry its plain meaning, confers far broader rights on private school students than does its federal counterpart. The Court of Appeals erroneously assumed that to read the state law "in light of" the federal law is to read them to be identical. Had the Kansas legislature wished to go no further than the federal law and regulations, the language of the IDEA and its rules were readily available as a model. The federal standard sets a minimum, so for the legislature to enact a lower level of services would be a futile act. There can be but one reason for the Kansas legislature to speak at all to the provision of special education and related services: to transcend the bounds of federal law and grant enhanced benefits. Thus the Court of Appeals missed the point of the very existence of the Kansas Auxiliary Services Act and the corresponding sections of the State Plan. Indeed, the court below passes off in a footnote the State Plan language quoted *supra,* wholly ignoring the Plan's instruction to pattern

services in accordance with private school students' **individual needs.** Pet. App. at A-29 n. 14.

The District has attempted to persuade this Court that its focus should be on its clustering of services for deaf students as a philosophical policy choice, an exercise in educational methodology. The District argues that it has an unfettered right to set educational policy in this district. The District fails to acknowledge that the powers of local Kansas school districts to set policies are not self-executing, but depend on statutory choices by the state legislature. *Unified School District No. 229 v. State,* 256 Kan. 232, 252, 885 P.2d 1170, 1182 (1994); *Unified School District No. 380 v. McMillen,* 252 Kan. 451, 464, 845 P.2d 676, 685 (1993). The legislature determined policy for Kansas schools when it chose to exceed the federal minimum set by the IDEA and enacted Kan. Stat. Ann. § 72-5393, extending special education services to private school children on-site unless circumstances render such action unreasonable and impractical.

Should this Court grant Petitioner's request for a writ, the Court should also review and overturn the lower court's overly restrictive interpretation of governing state law.

II.

IN CAPPING THE DISTRICT'S OBLIGATION TO FUND INTERPRETIVE SERVICES TO MICHAEL FOWLER AT HIS PRIVATE SCHOOL BY THE AVERAGE COST OF PROVIDING SUCH SERVICES IN THE DISTRICT'S PUBLIC SCHOOLS, THE COURT OF APPEALS FAILED TO CONSTRUE THE RELEVANT REGULATIONS AS A WHOLE; THE COURT OF APPEALS RELIED ON THE "EQUAL EXPENDITURE" PROVISIONS OF 34 C.F.R. § 76.655(a), BUT ARBITRARILY REJECTED THE EXPRESS EXCEPTION OF 34 C.F.R. § 76.655(b), WHICH MANDATES UNEQUAL EXPENDITURES WHEN THE COST OF MEETING STUDENT NEEDS DIFFERS BETWEEN PRIVATE SCHOOLS AND PUBLIC SCHOOLS.

The Court of Appeals held in this case that the District was obligated to provide Michael Fowler with interpretive services at the private school Michael attends, but that the District's obligation was capped, and did not extend beyond the obligation to pay toward the cost of Michael's sign language interpreter the same amount that that the District on average spends for "such services" in its public schools. In reaching that conclusion, the Court of Appeals relied heavily on 34 C.F.R. § 76.655(a), which provides that:

> (a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:
>
> > (1) A student enrolled in a private school who receives benefits under the program; and

> (2) A student enrolled in a public school who receives benefits under the program.

The Court of Appeals explained that the quoted regulation "seems to endorse the spending of the average amount spent per student in the public school on an individual private school student" and that "the use of the average amount . . . takes into account variations in the amounts spent on individuals in the public school, because of the particular needs of their IEPs." Pet. App. at A-25.

The obvious flaw in the reasoning of the Court of Appeals is that the key regulation is qualified in the very next subsection. 34 C.F.R. § 76.655(b) provides an explicit exception to the "equal expenditure" rule of thumb of the subsection (a):

> (b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

On the record below, the "average cost" of providing interpretive services to private school students is, exactly, the cost of providing them to Michael Fowler, the only such student shown to be receiving services.

The Court of Appeals acknowledged that its holding "might initially appear to conflict with" subsection (b). Pet. App. at A-25 n. 12. That acknowledgement is an understatement: on the facts of this case subsection (b) by its plain language flatly contradicts the Court of Appeals imposition of an "average cost"

cap on the District's obligation. The Court of Appeals nonetheless blithely dismissed subsection (b), stating that it did not mean what it said ("the regulation must not have intended such a result") or that, even if it did mean what it said, it was unreasonable, inconsistent with the statute, and therefore a legal nullity. *Id.*

The Court of Appeals' rejection of subsection (b) is wholly arbitrary. The language of that regulation could not be more explicit, whereas the Court of Appeals itself noted that IDEA itself, and/or the other regulations the Court of Appeals deemed relevant, exhibited "ambiguity and little clarity," Pet. App. at A-10 n. 5, and "are amorphous in design and imprecise in message," Pet. App. at A-12 (quoting *Cefalu v. East Baton Rouge Parish School Board,* 103 F.3d 393, 397 (5th Cir. 1997)). Such a plainspoken regulation is ordinarily entitled to great deference. *See, e.g., Udall v. Tallman,* 380 U.S. 1, 16 (1965).

The deference due subsection (b) might be overcome if the regulation clearly contradicted the statute, or its legislative history, or another contemporaneous or more senior regulation, as the Court of Appeals noted. Pet. App. at A-25 n. 12. But the necessary statement of clearly contrary legislative intent cannot be found in the admittedly ambiguous, unclear, amorphous, and imprecise statutory and regulatory provisions from which the Court of Appeals somehow sniffed out an alternative meaning. Indeed, it is possible to construe the statute and all the regulatory provisions in full harmony. The consonance of subsection (b)'s plain language with the statute and other regulations is well demonstrated by the district court's ruling to that effect, *see* Pet. App. at B-11 to B-12, and by the construction placed on the statute and regulations by other courts. *See, e.g., Cefalu,* 103 F.3d 393; *Russman v. Sobol,* 85 F.3d 1050 (2d Cir. 1996), *petition for cert. filed,* 65 U.S.L.W. 3381 (Nov. 18, 1996).

CONCLUSION

Respondents Michael Fowler and his parents explain in their Brief in Opposition that the District's petition for writ of certiorari should be denied. Should this Court grant the District's petition, however, Respondent's Cross-Petition for a Writ of Certiorari should be granted, for the reasons stated above.

Respectfully submitted,

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